87-1414

Supreme Court, U.S.
FILED
MAR 21 1988
CLERK

In The
Supreme Court of the United States
October Term, 1987

NICHOLAS MARINO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

SUPPLEMENTAL PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

WASHOR, GREENBERG & WASHOR
Attorneys for Petitioner
291 Broadway
New York, NY 10007
(212) 732-2077

MICHAEL S. WASHOR
HARVEY L. GREENBERG
On the Petition

Dick Bailey Printers. 203 Richmond Avenue ■ Staten Island, New York 10302
Tel.: (212) 608-7666 — (718) 447-5358 — (516) 222-2470 — (914) 682-0848

QUESTIONS PRESENTED

1. May a criminal defendant use the entrapment defense when he admits committing all of the acts constituting the offense charged but denies possessing the requisite criminal intent?

PARTIES

The Appellant in the United States Court of Appeals for the Third Circuit and the defendant in the United States District Court of New Jersey, was NICHOLAS MARINO.

TABLE OF CONTENTS

Page

Questions Presented i

Parties i

Table of Authorities iii

Petition for Writ 1

Opinions Below 1

Jurisdiction 2

Constitutional Provisions 2

Preliminary Statement 3

Statement of Facts 4

Petitioner's Defense 4

Reasons for Granting the Writ 5

POINT I—This Court should grant Certiorari and summary reverse this case premised upon the recent Decision in *Mathews vs. United States* wherein the identical issue raised by Petitioner was decided favorably, to wit, the right of Petitioner to have had his defense of entrapment presented to the Petit Jury when Petitioner admitted committing all of the acts constituting the offenses charged but denied possessing the requisite criminal intent 5

Conclusion 7

Appendix A—Trial Court Decisions 4/22/87 As it pertains to this Supplemental Petition.....1a

TABLE OF AUTHORITIES

Cases *Pages*

Mathews v. U.S. __ U.S. __, 42 CRL 3069 No. 86-6109, decided 2/24/88 .....*passim*

In The
Supreme Court of the United States
October Term, 1987

NICHOLAS MARINO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

SUPPLEMENTAL PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

NICHOLAS MARINO supplementally petitions this Court to issue a Writ of Certiorari to the United States Court of Appeals for the Third Circuit (hereinafter Circuit Court) to review the decision of that Court, which upheld petitioner's conviction for conspiracy to transport stolen securities in interstate commerce and to sell and dispose of said stolen securities in violation of Title 18 U.S.C. Section 371, and for receipt, sale, and disposition of stolen securities in violation of Title 18 U.S.C. Section 2315 and Section 2, and upheld the imposition of a sentence of incarceration for Eighteen (18) months and a fine of Five-Thousand ($5,000.00) Dollars.

OPINIONS BELOW

The decision and Judgment of the United States District Court (Ackerman, J.), as pertains to the issue of entrapment is set forth in the annexed appendix, "A."

The decision of the United States Court of Appeals has not as yet been published in the official reports but is set forth in the annexed appendix, "C", of Petitioner's original Petition.

JURISDICTIONAL STATEMENT

This supplemental Petition seeks review of a decision of the United States Court of Appeals for the Third Circuit, rendered on December 23, 1987, which decision affirmed petitioner's conviction for violating the provisions of Title 18 U.S.C., Sections 371, 2315 and 2.

The original petition was filed with this Court within 60 days of the date that the decision of the Circuit Court was rendered on December 23, 1987.

This supplemental Petition is filed prior to any decision being rendered on the original petition in order to incorporate this Court's decision in *Mathews v. United States,* __ U.S. __, 42 CRL 3069, decided 2/14/88.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides, in pertinent part, as follows:

> "No person shall be . . . compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law."

PRELIMINARY STATEMENT

This is an appeal by the petitioner, NICHOLAS MARINO, from a judgment of conviction had after trial before the Court and Jury (Judge Harold A. Ackerman), United States District Court, District of New Jersey, whereby the said petitioner was convicted under Counts I and III (petitioner was found not-guilty under Count II) of Indictment Number 86-36, charging, respectively, under Count I, conspiracy under Title 18 U.S.C. 371, to transport stolen securities in interstate commerce and to sell and dispose of said stolen securities; and, under Count III, the substantive crime of receipt, sale and disposition of stolen securities in violation of Title 18 U.S.C. 2315 & 2.

Petitioner MARINO was sentenced as follows: On Count I, Eighteen (18) Months incarceration and a fine of TWENTY-FIVE HUNDRED ($2,500.00) DOLLARS: On Count III, eighteen (18) Months incarceration and a fine of TWENTY-FIVE HUNDRED ($2,500.00) DOLLARS: The prison sentences under Counts I & III to run concurrently.

The United States Court of Appeals for the Third Circuit affirmed.

This supplemental petition asks this Court to review the Circuit Court's decision. Petitioner contends that his Constitutional rights were denied him in that he was deprived of the defense of entrapment although he admitted all of the acts constituting the offense charged but denied possessing the requisite criminal intent.

This Court, in *Mathews v. United States*, __ U.S. __, 42 CRL 3069, No. 86-6109, decided 2/24/87, resolved the identical issue raised herein.

On appeal to the Circuit Court, petitioner raised the issue alluded to above. The decision of the Circuit Court, dated December 23rd, 1987, of which review is sought, rejected petitioner's contentions and affirmed his conviction, while recognizing the pendency of decision in *U.S. v. Mathews, supra,* in this Court.

STATEMENT OF FACTS

Petitioner adopts and incorporates the Statement of Facts submitted in his original Petition, pages 4 through 9, as if fully reiterated herein in its entirety.

PETITIONER'S DEFENSE

Petitioner adopts and incorporates statement of his defense submitted in his original petition, pages 9 through 16, as if fully reiterated herein in its entirety.

REASONS FOR GRANTING REVIEW

POINT I

THIS COURT SHOULD GRANT CERTIORARI AND SUMMARILY REVERSE THIS CASE PREMISED UPON THE RECENT DECISION IN *MATHEWS vs. UNITED STATES* WHEREIN THE IDENTICAL ISSUE RAISED BY PETITIONER WAS DECIDED FAVORABLY, TO WIT, THE RIGHT OF PETITIONER TO HAVE HAD HIS DEFENSE OF ENTRAPMENT PRESENTED TO THE PETIT JURY WHEN PETITIONER ADMITTED COMMITTING ALL OF THE ACTS CONSTITUTING THE OFFENSES CHARGED BUT DENIED POSSESSING THE REQUISITE CRIMINAL INTENT.

I. In the case at bar, petitioner presented evidence of the Government inducement, initiation and solicitation and total lack of propensity and disposition by petitioner to violate the law.

Petitioner admitted all the acts underlying the charges against him, but denied the element of criminal intent.

Petitioner's timely request for an instruction of the defense of entrapment was denied as was the post-verdict motion which was addressed to the same issue.

In *Mathews v. United States, supra,* this Court, in reversing held:

> "We hold that even if the defendant denies one or more elements of the crime, he is entitled to an entrapment instruction whenever there is sufficient evidence from which

a reasonable jury could find entrapment." (supra, at 3070)

> "That a valid entrapment defense has two related elements: government inducement of the crime, and a lack of predisposition on the part of the defendant to engage in the criminal conduct. (Citations omitted). Predisposition, the principal element in the defense of entrapment . . . focuses upon whether the defendant was an "unwary innocent" or instead, an "unwary criminal" who readily availed himself of the opportunity to perpetuate the crime (Citations omitted). The question of entrapment is generally one for the jury, rather than for the Court." supra, at 3070.

In the case at bar, the record is replete with evidence that the Government, through its informer-agent, Morton Swersky, induced, solicited and beguiled the petitioner. The Government cannot seriously contend otherwise in light of the overwhelming evidence of Governmental inducement.

At the trial level, the Government never contended insufficiency of inducement by the Government agent (Swersky); nor did they raise that issue on appeal in the Third Circuit.

Petitioner introduced evidence demonstrating his lack of predisposition to commit any of the crimes charged. This evidence was not controverted and stands uncontradicted.

In sum, the two related elements of the defense of entrapment, government inducement and lack of predisposition to violate the law, were fully evidenced at trial.

All that remains is the application of the law as promulgated and enunciated in *Mathews, supra,* to the instant petition, where petitioner properly preserved the issue for review.

CONCLUSION

Upon the facts and the principles of law outlined above, it is urged that this Court issue a Writ of Certioriari to the United States Court of Appeals for the Third Circuit and review the decision of that Court or, alternatively, summarily reverse the instant case in light of Mathews vs. United States, remanding the matter to the Third Circuit Court of Appeals directing entry of judgment in accordance with this Court's decision rendered in Mathews v. United States.

Respectfully submitted,

WASHOR, GREENBERG & WASHOR
Attorneys for Petitioner
291 Broadway
New York, NY 10007
(212) 732-2077

MICHAEL S. WASHOR
HARVEY L. GREENBERG
On the Petition

APPENDIX A - TRIAL COURT DECISION 4/22/87 AS PERTINENT TO THE SUPPLEMENTAL PETITION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CRIMINAL ACTION NO. 86-36

UNITED STATES OF AMERICA.

v.

NICHOLAS MARINO, et al.,

Defendants.

Samuel Alito, Esq.
United States Attorney
by: Daniel J. Bibbons, Esq.
Asst. United States Attorney
970 Broad Street
Newark, New Jersey 07102

Michael S. Washor, Esq.
Washor, Greenberg & Washor
291 Broadway
New York, New York 10007
Attorneys for Defendant Marino

OPINION

ACKERMAN, District Judge.

This is a criminal action brought by the United States Government against defendant Nicholas Marino and others, alleging violations of federal criminal prohibitions against interstate dealings in stolen securities. Before me now are defendant Marino's motions for post-conviction relief.

In September and October, 1986, Marino was tried before a jury in this court on two counts of dealings in and one count of conspiring to deal in stolen bearer bonds moving in interstate commerce, in violation of 18 U.S.C. Sections 2315, 2 and 371. On October 2, 1986, defendant was convicted by the jury on Count I of the indictment, which stated the conspiracy charge, and Count III of the indictment, which stated one of the two charges of dealing in stolen bearer bonds. Defendant was acquitted on Count II, the other charge of dealing in stolen bearer bonds.

Defendant has moved for arrest of judgment, relief from the verdict, and a new trial, on the following grounds:. . . .that the verdict was contrary to law (and) that the interest of justice demands a new trial,. . . .I shall consider each of these grounds in turn.

Defendant's grounds for relief, that the verdict was contrary to law (and) that the interest of justice demands a new trial, are all based on the following more specific contentions: that the court committed an error of law when it refused to instruct the jury on the law of entrapment; that the court committed errors of law in regard to each of defendant's request to charge the jury, and exceptions to the jury charge which the court denied; I shall discuss each of these contentions in turn.

In order to assert a defense of entrapment in this circuit, a defendant must first admit his "guilt of the crime

charged and all of its elements, including the required mental state." U.S. v. Hill, 655 F.2d 512, 514 (3d Cir. 1981) (citing U.S. v. Watson, 489 F.2d 504 (3d Cir. 1973), cert. denied, 464 U.S. 1039 (1984). See Government of the Virgin Islands v. Braithewaite, 782 F.2d 399 (3d Cir. 1986). The Third Circuit has specifically rejected the alternative view that an entrapment charge may be given once a defendant admits only the "operative facts" of the charge, and not each element specifically, including the requisite mental state. U.S. v. Janotti, 673 F.2d 578, 601 (3d Cir. 1982). Defendant Marino never did admit the mental states with which he was charged under any of the three counts in the indictment, including the two counts on which he was convicted, Counts I and III. Therefore, his request for an entrapment charge was properly denied at the time it was made, and does not at this time constitute an error of law requiring relief from the jury verdict.

In conclusion, I find that no error was made in refusing to charge the jury on entrapment; that other unspecified rulings of the court denying requests to charge the jury, and exceptions to the jury charge made by defendant do not require reconsideration.